

Leong Kok Huat v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — CRIMINAL REVISION NO 43-2 OF 1998

ABDUL KADIR MUSA J

12 JUNE 1998

Criminal Procedure — *Appeal* — *Filing of notice of appeal by Solicitor General* — *Whether notice of appeal must be filed by Attorney General personally* — *Courts of Judicature Act 1964 s 50(3)* — *Federal Constitution art 145* — *Criminal Procedure Code (FMS Cap 6) s 376* — *Interpretation Acts 1948 and 1967 s 111(1)*

Criminal Procedure — *Sentence* — *Construction of penalty section* — *Whether each type of penalty should be construed 'disjunctively' or 'conjunctively'* — *Whether words 'shall be liable to' give court complete judicial discretion to impose any of the penalties provided either in the 'alternative' or 'cumulatively'* — *Appropriate sentence on the facts* — *Immigration Act 1959/63 s 55D*

Words and Phrases — *'Absence'* — *Criminal Procedure Code (FMS Cap 6) s 376(2)*

The accused was charged in the magistrate's court for an offence under s 55D of the Immigration Act 1959/63 ('the Act'). He was found guilty and subsequently convicted by the court below and was sentenced to: (i) a fine of RM50,000; (ii) an imprisonment term of five years; and (iii) four strokes of the rotan. Counsel for the accused applied for the case to be revised by the High Court. The High Court set aside the sentence and substituted it with only a fine of RM65,000. The learned Solicitor General appealed vide a notice of appeal dated 4 May 1998 ('the notice of appeal') purportedly signed by the Solicitor General in the absence of the Public Prosecutor.

Held:

- (1) The notice of appeal must be filed by the Attorney General personally. The Solicitor General could file such notice if, and only if, the Attorney General himself could not act personally due to his 'absence' but not otherwise. Since there was no such absence on the relevant date (ie 4 May 1998), the Solicitor General could not exercise any of the powers of the Attorney General. The notice purported to be filed in the 'absence' of the Attorney General was therefore bad in law (see pp 412D, I and 413B-C); *Cooper v Croll* [1940] 1 DLR 610 followed.

However, the matter is still appealable if there is either consent in writing by the Attorney General for the filing of the notice or leave to appeal granted by the Court of Appeal. In the instant case, neither of the requirements were fulfilled. In such a situation, the notice filed by the Solicitor General was bad in law (see p 413C-E).

- A** (2) Each limb of the 'penalty part' of s 55D of the Act should be construed 'disjunctively' from one another and not 'conjunctively'. The words 'shall be liable to' found in s 55D not only gives the court a complete judicial discretion to impose the three types of penalties provided thereto either in the 'alternative' or
- B** 'cumulatively', but, in appropriate cases, it does not prevent the court to invoke s 294 of the Criminal Procedure Code (FMS Cap 6). The word 'and' found in s 55D must be construed 'conjunctively'. In the instant case and on the facts, the most appropriate sentence would be a fine in the manner specified by the first limb of the 'penalty part' in s 55D (see pp 413F, 416A–
- C** B and 419G–H).

Obiter:

- The sequence of the three limbs of the 'penalty part' in s 55D of the Act was first, a fine, followed by 'the imprisonment term' and lastly 'the whipping sentence'. It must have been the intention of the legislature to punish the offender like the accused first, by an appropriate fine if the facts against his wrongful act so justified before considering the other alternative penalties. It is only when there is convincing evidence to show that the accused can 'buy' his wrongful act with a sentence of just a fine from the proceeds of his wrongful act direct or indirectly that the court should find and inflict other alternative penalties but not otherwise (see p 420B–E).
- D**
- E**

[Bahasa Malaysia summary]

- F** Tertuduh telah dipertuduhkan di mahkamah majistret untuk satu kesalahan di bawah s 55D Akta Imigresen 1959/63 ('Akta tersebut'). Ia didapati bersalah dan kemudiannya disabit oleh mahkamah bawah dan dijatuhkan hukuman: (i) denda sebanyak RM50,000; (ii) tempoh penjara selama lima tahun; dan (iii) empat sebatan rotan. Peguam tertuduh memohon supaya kes disemak oleh Mahkamah Tinggi.
- G** Mahkamah Tinggi mengetepikan hukuman dan menggantinya dengan denda RM65,000 sahaja. Peguamcara Negara yang arif merayu melalui suatu notis rayuan bertarikh 4 Mei 1998 ('notis rayuan tersebut') kononnya ditandatangani oleh Peguamcara Negara dalam ketidakhadiran Pendakwa Raya.
- H**

Diputuskan:

- (1) Notis rayuan tersebut mestilah difailkan oleh Peguam Negara sendiri. Peguamcara Negara hanya boleh memfailkan notis begitu jika, dan hanya jika, Peguam Negara sendiri tidak boleh bertindak disebabkan 'ketidakhadiran' tetapi tidak sebaliknya. Oleh kerana tiada ketidakhadiran pada tarikh yang relevan (iaitu 4 Mei 1998), Peguamcara Negara tidak boleh melaksanakan mana-mana kuasa Peguam Negara. Maka notis yang kononnya difailkan dalam 'ketidakhadiran' Peguam Negara adalah tidak elok di sisi undang-
- I**

undang (lihat ms 412D, I dan 413B-C); *Cooper v Croll* [1940] 1 DLR 610 diikut.

Namun demikian, perkara ini masih boleh dirayu sekiranya terdapat sama ada kebenaran bertulis daripada Peguam Negara untuk pemfailan notis atau kebenaran merayu diberikan oleh Mahkamah Rayuan. Dalam kes ini, tidak satu pun daripada keperluan dipenuhi. Dalam keadaan sedemikian, notis yang difailkan oleh Peguamcara Negara adalah tidak elok di sisi undang-undang (lihat ms 413C-E).

- (2) Setiap anggota 'bahagian penalti' s 55D Akta tersebut haruslah ditafsirkan secara 'penyarak' antara satu sama lain dan bukan secara 'penghubung'. Perkataan-perkataan 'shall be liable to' yang didapati dalam s 55D bukan sahaja memberikan mahkamah budi bicara kehakiman sepenuhnya untuk mengenakan tiga jenis penalti yang diperuntukkan sama ada secara 'alternatif' atau 'kumulatif', tetapi, dalam kes-kes yang wajar, ia tidak menghalang mahkamah daripada menggunakan s 294 Kanun Acara Jenayah (NMB Bab 6). Perkataan 'dan' yang didapati dalam s 55D mestilah ditafsirkan secara 'penghubung'. Dalam kes ini dan atas fakta-fakta, hukuman paling wajar adalah denda dalam cara yang ditetapkan oleh anggota pertama 'bahagian penalti' dalam s 55D (lihat ms 413F, 416A-B dan 419G-H)

Obiter:

Babak tiga anggota 'bahagian penalti' dalam s 55D Akta tersebut adalah pertama, denda, disusuli dengan 'tempoh penjara' dan akhirnya 'hukuman sebat'. Ia mestilah merupakan hasrat badan perundangan untuk mendenda pesalah seperti tertuduh pertama, dengan denda yang wajar sekiranya fakta-fakta terhadap perbuatan salahnya menjustifikasikannya sebelum mempertimbangkan penalti alternatif yang lain. Hanya apabila terdapat keterangan yang meyakinkan bagi menunjukkan bahawa tertuduh boleh 'membeli' perbuatannya yang salah dengan hukuman denda sahaja hasil daripada perbuatan yang salah secara langsung atau tidak langsung barulah mahkamah haruslah memutuskan dan mengenakan penalti alternatif yang lain tetapi tidak sebaliknya (lihat ms 420B-E).]

Notes

For cases on appeal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 109-446.

For cases on sentence, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2213-2674.

Cases referred to

Cooper v Croll [1940] 1 DLR 610 (folld)

Jayanathan v PP [1973] 2 MLJ 68 (refd)

- A** *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 (refd)
 PP v Abdullah bin Pandak Hassan & Anor [1975] 2 MLJ 276 (refd)
 PP v Leonard Glenn Francis [1989] 2 MLJ 158 (refd)
 PP v Khairuddin [1982] 1 MLJ 331 (refd)
 PP v Sharikat Perusahaan Makanan Haiwan Berkerjasama [1969]
 2 MLJ 250 (refd)
- B** *PP v Wahab* [1964] MLJ 265 (refd)
 R v Ball [1951] 35 Cr App R 164 (refd)

Legislation referred to

- C** Courts of Judicature Act 1964 s 50(2), (2A), (3)
 Criminal Procedure Code (FMS Cap 6) ss 323, 325(1), 376(1), 422
 Emergency Immigration (Amendment) Order 1984 s 56
 Federal Constitution art 145(1)–(3)
 Firearms (Increased Penalties) Act 1971 s 8
 Interpretation Acts 1948 and 1967 s 111(1)
- D** Immigration Act 1959/63 s 55D
 Immigration (Amendment) Act 1996 s 16
 Immigration Enactment s 56 [Brunei]
 Prevention of Crime Ordinance 1959 s 15(4)
 Vagrants and Decrepit Persons Enactment (FMS Cap 191) s 3(a)
- E** *RR Mahendran (RR Mahendran & Co)* for the applicant.
 Ishak bin Yusof (Deputy Public Prosecutor) for the respondent.

Abdul Kadir Musa J: On 21 January 1998, Mr RR Mahendran, acting for and on behalf of Leong Kok Huat, the accused, in the case of A 83–1–98 which was dealt with by Johor Bahru Majistrate Court on 1 January 1998, wrote a letter (see encls (1) and (2)) to the court to seek its indulgence to have his client's case revised under s 323 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') and urged the court to act accordingly under s 325(1) of the same Code. Under the current administrative arrangement, his matter was assigned to my court. That being so and upon close perusal of his said letter, I decided to oblige his request by fixing the revision to be heard on 21 April 1998. At this juncture, it would be most appropriate for me to briefly outline the chronology of events which ultimately culminated in the filing of the notice of appeal by the learned Solicitor General dated 4 May 1998 against my decision on revision.

H The accused was arrested on 19 December 1997 and subsequently charged for an offence under s 55D of the Immigration Act 1959/63 (Act 155) ('the Act 155'). The charge against him reads as follows:

I Bahawa kamu pada 19 Disember 1997 jam lebih kurang 10.05 malam, di rumah No 82, Jalan Kosa 7, Taman Perling, di dalam daerah Johor Bahru di dalam Negeri Johor Darul Takzim didapati telah memalsukan Pas Lawatan dan juga Visa, butir-butir seperti di lampiran, milik Jabatan Imigresen Malaysia. Oleh itu kamu telah melakukan kesalahan di bawah s 55D Akta Imigresen 1953/63 (Pindaan 1997) dan boleh dihukum di bawah seksyen yang sama.

All the falsified documents referred to in the 'butir-butir seperti di lampiran' were subsequently tendered and received by the court below as P3A-P3H (for 'pas lawatan'), P4A-P4E (for 'pas lawatan berbentuk sticker') and P5A-P5C ('visa'). The accused pleaded guilty to the said charge, whereby the brief facts of the case was received by the said court as P2.

From P2, it was clear that the accused sold each of the falsified document at RM250. He was doing that ever since the Immigration Department started to introduce 'temporary six months work permits' and made no denial to that. As such, he was found guilty and subsequently convicted by the court below and was sentenced to: (i) a fine of RM50,000; (ii) an imprisonment term of five years; and (iii) four strokes of rotan. The accused's application for stay of execution in respect of the said fine and imprisonment term was refused by the learned magistrate pending the outcome of his appeal. The accused could not and did not pay the fine.

It is important to note at this very juncture that, at the time of hearing the revision there was no typed note of the proceedings in the file that was transmitted to me for consideration. As such, I have to be contented with only what were then available in the said file; the most important is the particulars contained in 'Court 114'.

From the relevant 'Court 114' under the column of 'pendapat' or 'findings', it was left vacant. There was no recording of the learned magistrate's findings as to the accused's 'guilt and conviction' in that column (see *PP v Abdullah bin Pandak Hassan & Anor* [1975] 2 MLJ 276) which, in an appropriate case, attracts any conviction and sentence imposed to be set aside even though the accused has pleaded guilty to the offence preferred against him unless it can be saved by s 422 of the CPC. Furthermore, without the benefit of the typed note of what was written by the said learned magistrate and/or my inability to decipher his handwriting, I could not find any such notation to that effect. It was in that context that I decided to invoke s 326 of the CPC by inviting both En Mahendran and En Ishak Yusof, the learned deputy public prosecutor, to address me accordingly.

Flowing from the above, and in their respective submissions, both En Mahendran and En Ishak agreed that, failure to record the necessary 'guilt and conviction' after the accused has pleaded guilty and accepted the facts in respect of the offence levelled against him without the operation of s 422 of the CPC, exposed the accused's 'conviction and sentence' wide open to be set aside by the court on revision. However, in the course of En Mahendran's submission and my pointing out to him that I was satisfied on the facts that there was no miscarriage of justice under s 422 of the CPC, he was contented not to pursue any further with the issue of 'wrong conviction' but only confine to persuade the court to revise the sentence imposed by the court below to a more just and equitable one. The learned DPP on the other hand, urged me not to disturb the sentence so imposed in the light of the current situation in connection with various offences relating to falsifying the travel documents and the influx of the illegal immigrants to Malaysia.

- A** After careful consideration of the submissions from both parties and all the relevant facts of the case as a whole, I am of the view that any offence under s 55D of the Act 155 cannot be taken lightly. However, having regard to the sentencing policy alongside with the legislative intention of the 'penalty parts' the said section, I held that, the sentence so imposed by the learned magistrate, in the circumstances of the facts of the instant case, is a little bit too harsh. As such, I set aside the said sentence and substituted it with only a fine of RM65,000. As he was unable to pay the said enhanced fine (ie from RM60,000 enhanced to RM65,000), I allowed him to pay by instalments. It is against my said decision (ie imposing just a fine), that the learned Solicitor General appealed vide her notice of appeal dated 4 May 1998. Before I proceed to give my reasons for doing so, it would be most appropriate for me at this juncture to be permitted to comment on the legality of the very notice of appeal aforesaid itself.

- D** In filing the said notice of appeal ('the notice'), the learned Solicitor General must have acted under s 50(3) of the Courts of Judicature Act 1964 ('the 1964 Act') without the need of obtaining the necessary leave to appeal from the Court of Appeal. Section 50(3) of the 1964 Act provides:

Notice of any appeal by the Public Prosecutor shall be given by, or with the consent in writing of, that officer only; and notwithstanding subsection (2) no leave of the Court of Appeal is required. (Emphasis added.)

- E** The presence of the words 'by the Public Prosecutor' and 'or with the consent in writing of that officer only', requires that such a notice must be filed by the honourable Attorney General personally by virtue of art 145(1)–(3) of the Federal Constitution read together with s 376(1) of the CPC, and not his learned Solicitor General. Thus, if the Public Prosecutor himself did not file or give his written consent to file such a notice, then by virtue of s 50(2) of the 1964 Act, any such notice filed without first obtaining leave from the Court of Appeal should not be valid in law. Unless and until such mandatory leave was obtained within 14 days after I have made the aforesaid decision on revision, there can be no appeal against my said decision to the Court of Appeal by virtue of s 50(2) and (2A) of the 1964 Act.

G However under s 376(2) of the CPC, it enables the learned Solicitor General to act and carry out the functions of the Public Prosecutor in case of the latter's absence or inability by providing as follows:

- H** The Solicitor General shall have all powers of a Deputy Public Prosecutor and shall act as Public Prosecutor in case of the *absence or inability* to act of the Attorney General. (Emphasis added.)

Below the signature of the learned Solicitor General in respect of the notice, the following were printed:

- I** Peguamcara Negara dalam masa ketiadaan Pendakwa Raya Malaysia. (Emphasis added.)

From that, I take it that she must have acted under s 376(2) of the CPC. In that context, the powers of the Attorney General are entrenched in art 145 of the Federal Constitution ('the Constitution'). Other than the

said s 376(2) of the CPC, s 111(1) of the Interpretation Acts 1948 and 1967 ('the 388 Act') also speaks of when and how the learned Solicitor General may exercise any of her powers exercisable personally by the Attorney General, but not otherwise. The said s 111(1) spelt out as follows: A

Unless in any written law it is otherwise expressly provided, the Solicitor General may perform any of the duties and may exercise any of the powers of the Attorney General. (Emphasis added.) B

Thus, even though s 111(1) of the 388 Act empowers the learned Solicitor General to 'perform any of the duties and may exercise any powers of the Attorney General', which obviously includes the filing of the notice as in the instant case, it is still qualified by the phrase 'unless in any written law it is otherwise expressly provided'. It is therefore clear to me that, under s 376(2) of the CPC, the learned Solicitor General can only, with the greatest respect to her, exercise any of the powers exercisable by the Attorney General personally contemplated by art 145 of the Constitution by virtue of the chemistry of s 376(2) of the CPC and s 111(1) of the 388 Act if, and only if, the honourable Attorney General himself cannot act personally due to his 'absence' but not otherwise. C D

According to the *Chambers Encyclopedia English Dictionary* (1994) at p 5, the word 'absence' means: E

- (1) the state of being away from work, etc;
- (2) the time when a person is away from work, etc.

Thus the fact that the honourable Attorney General may not be in his office because he has to perform his official duty elsewhere in Malaysia does not mean that 'he was being away from work' or being 'absence' in the context of the legislative intention of s 376(2) of the CPC. F

In *Cooper v Croll* [1940] 1 DLR 610, the court has to decide whether or not a majority of a municipal council could themselves call a meeting in the 'absence' of the mayor. It was held by Gillanders J at pp 615-616 that:

[The court was persuaded to accept] ... that 'absence' ... should be construed in its widest sense; that it requires no particular degree or amount of absence, viz from the city or the province, and that the applicants, going as they did, to the respondent's office in the City Hall and remaining from 9.30 to 11.00 am and finding the mayor not present, absence is established *I cannot conclude that there was an absence* here to warrant the applicant taking the steps they did. *The respondent was in the city; ...* . (Emphasis added.) G H

Likewise, the word 'absence' contained in s 376(2) of the CPC surely connotes not just physical absence from his office, but that the honourable Attorney General should at least, for example, either be on official leave or out of Malaysia on the material date (ie in the instant case, on 4 May 1998). In that respect, it is a known fact which I can take judicial notice that on 4 May 1998, the honourable Attorney General was in Johor Bahru performing his official duty required of him under art 145(2) of the Federal Constitution. 'In the city' in the aforesaid *Cooper's* case can aptly I

A be equated with 'being in Malaysia' in the context of s 376(2) of the CPC, and as such, there was no such 'absence' referred to by the said s 376(2). On that basis, and by the interaction of the words 'absence ... to act ...' (s 376(2), CPC) and '... written law [ie the CPC] expressly provided, ...' (s 111(1) of the 338 Act), it is my respectful conclusion that the learned Solicitor General cannot exercise any of the powers of the honourable Attorney General entrenched in art 145 of the Constitution. In that context, and with the greatest respect to the learned Solicitor General, her notice purported to be filed in the 'absence' of the honourable Attorney General is therefore bad in law. Thus if there is no notice, there can be no appeal before the Court of Appeal.

C Notwithstanding the honourable Attorney General's 'absence' (s 376(2), CPC), she can certainly file in the notice by virtue of s 50(3) of the 1964 Act if there was a 'consent in writing' by the honourable Attorney General, consenting the learned Solicitor General to do so. Here again, there was no such a 'consent in writing' contemplated by the said s 50(3). Thus without it, the notice is therefore again bad in law.

D If the notice is bad in law due to what has just been discussed above, the matter is still appealable if there is leave to appeal granted by the Court of Appeal under s 50(2) of the 1964 Act. Such leave must be obtained within 14 days after I have made my decision on revision under s 50(2A) of the 1964 Act. Unfortunately, there was no such application. In such a situation, the notice so filed by the learned Solicitor General purported to be 'in the absence of the Attorney General' should and must also therefore be construed as being bad in law. Without any legally valid notice of appeal, there can be no appeal in law before the Court of Appeal.

E Be that as it may, if I am held wrong with my above conclusion, a detailed analysis of s 55D of the Act 155 convinced me to conclude that each limb of the 'penalty part' of the said section should be construed 'disjunctively' from one another and not 'conjunctively'. As such, the sentence can be imposed either in the 'alternative' or 'cumulatively'. The three limbs of the 'penalty part' I was referring to are:

- G (i) the fine part;
(ii) the imprisonment part; and
(iii) the whipping part.

For ease of reference, s 55D of the Act 155 provides:

- H Any person who makes, forges or alters an endorsement or a document to be used as a Visa, Permit, Pass or Certificate under this Act shall be guilty of an offence against this Act and *shall*, on conviction, *be liable to a fine* of not less than thirty thousand ringgit but not more than one hundred thousand ringgit *and to imprisonment* for a term of not less than five years but not more than ten years *and shall also be punished* with whipping of not more than six strokes. (Emphasis added.)
- I

A close perusal to cl 16 of the Explanatory Note to the Bill which introduced s 55D of the Act 155 vide the Immigration (Amendment) Act 1996 (s 16) only states that the section 'deals with the offence of forging or altering or

endorsement of a document used as a visa, permit, pass or certificate'. It does not explain as to whether the different limbs of the 'penalty part' should be interpreted 'disjunctively' by virtue of the presence of the word 'and' and the absence of any comma after each limb of the said 'penalty part.'

However, comparative analysis of a number of decided cases compelled me to conclude that the word 'and' contained thereto is intended by the legislature to have a 'disjunctive' effect for the reasons spelt out below.

The *Concise Oxford Dictionary* (9th Ed, 1995) at p 46, gives the meaning of the word 'and', inter alia, as:

... implying variety ...

Thus, the words 'implying variety' should therefore mean, in the context of the 'penalty part' of the aforesaid s 55D, 'different ways of imposing' the three types of sentences provided by the said section. The ability for the court to do so is certainly the property of the 'disjunctive method' of doing an act permitted by the said section. Thus, the presence of the word 'and' without a comma after each limb of the 'penalty part' of the said section should and must therefore be construed as 'disjunctive' in effect and not 'conjunctive' as is normally assigned to the meaning of the conjunction 'and'.

My above conclusion is further enhanced by the persuasiveness of the Brunei case of *Nili Anak Gumbang & Ors v PP* [1985] 1 MLJ 464, where the court there held that, the word present in s 56 of the Emergency Immigration (Amendment) Order 1984 has a 'disjunctive' effect. In that case, Power J, at p 465G-I — where the aforesaid s 56 provides that offenders are liable 'to imprisonment for a term of not less than one year and not more than seven years and a fine not exceeding twenty thousand dollars and whipping — held that:

It seems to me clear, by virtue of s 38 of the Interpretation and General Clause Enactment 1959 [‘the 1959 Enactment’], ... the word ‘and’ shall signify that the penalties may be inflicted alternatively or cumulatively ... [thus] it is open to the court under the penalty section [or part] to impose either a prison sentence or a fine or whipping but that, if the court does decide to impose a prison sentence, it must be for not less than one year. (Emphasis added.)

Section 38 of the 1959 Enactment provides as follows:

Whenever, in or by virtue of any written law, more than one penalty is prescribed for an offence, *the use of the word ‘and’ shall signify that the penalties may be inflicted alternatively or cumulatively ...* (Emphasis added.)

In that respect, the word 'alternatively' must necessarily mean 'disjunctively'. There is also no comma after each limb of the aforesaid penalty section. Similarly in s 55D of Act 155, the word 'and' is also present after each limb of the three type of the penalties provided thereto, and there is also no comma after each such limb. Platformed by that reasoning, I firmly concluded that the word 'and' contained in the aforesaid s 55D must

A therefore be intended by the legislature to be construed as 'disjunctive' and not 'conjunctive'.

From the above analysis, it can thus be concluded that, a person who had pleaded or found guilty of committing an offence under s 55D Act 155, as the accused in the instant case, is liable to be punished in one of the following:

B

- (i) shall be liable to a fine of not less than RM30,000 but not more than RM100,000; or
- (ii) shall be liable to imprisonment for a term not less than five years but not more than ten years; or

C

- (iii) shall be liable to a fine as specified in (i) above, plus to an imprisonment term as specified in (ii) above; or
- (iv) shall be liable to an imprisonment term as per (ii) above, and also to whipping of not more than six strokes; or

D

- (v) shall be liable to a fine as per (i) above, plus an imprisonment as per (ii) above, and also to whipping of not more than six strokes. Hence, it is clearly demonstrated that, the punishment as specified in one of the 'five options' or 'alternatives' open to the court to impose, having regards to fact of each particular case, is due to the 'disjunctive' effect of the word 'and' found in the aforesaid s 55D.

E Lastly, the presence of the words 'shall ... be liable to ...' in the aforesaid s 55D gives the court a judicial discretion as to what should be regarded by the court as an appropriate sentence having judicially considered all the facts of a particular case; and that, is now a settled law. The words 'liable to' was considered by Hashim J (as he then was) on revision in the case of *PP v Wahab* [1964] MLJ 265.

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In the said *Wahab's* case, the accused was charged under s 6(1)(a) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance No 43 of 1958 ('Ord No 43') for having in possession a 'pisau jam'. He pleaded guilty to the charge and this was accepted by the learned magistrate whereby he ordered that the accused be whipped with 4 strokes of a light rattan. Since there was no s 6(1)(a) of the 43 Ord, his Lordship therefore directed that the letter '(a)' after 's 6(1)' be deleted.

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Section 6(1) of Ord No 43 provides:

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Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction be liable to imprisonment for a term not exceeding two years, and to whipping. (Emphasis added.)

As to the effect of that section, His Lordship at p 266D said:

I

... s 6(1) of the Ordinance states, inter alia, that on conviction be liable to imprisonment ... and to whipping. My interpretation of this section is that the term of imprisonment *not mandatory and a fine may be imposed in lieu of imprisonment*. (Emphasis added.)

In fact, the words 'shall be liable to' found in s 55D of Act 155 not only give the court a complete judicial discretion to impose the three types of penalties provided thereto either in the 'alternative' or 'cumulatively', but, in appropriate cases, it does not prevent the court to invoke s 294 of the CPC. For that, I am well supported by the case of *Jayanathan v PP* [1973] 2 MLJ 68, where the words 'shall be liable' found in s 15(4) of the Prevention of Crime Ordinance 1959 ('the 1959 Ord') were considered by the then Federal Court. A B

Section 15(4) of the 1959 Ord provides as follows:

A registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and *shall be liable* to imprisonment for a term not exceeding five years and not less than two years. (Emphasis added.) C

It was held by the said court that (at p 68):

(2) the words '*shall be liable*' in s 15(4) ... *do not make the term of imprisonment mandatory and the learned president was therefore entitled to act under s 294 [CPC] and bind over the accused.* (Emphasis added.) D

The reason for it was stated by Ong Hock Sim FJ (delivering the judgment of the court) at p 69A–B as follows:

In our view, if the legislature intended that s 294 is to cease to have application in respect of the offence under s 15 of [the 1959 Ord], it should be so expressed in the clearest possible language. We can find no such provision. E

thus it was held that, the said s 15(4) did not overrule the provision of s 294 of the CPC. The same view was observed by Aitken J in the case of *PP v Man bin Ismail* [1939] MLJ 207. F

In *Man's* case, Aitken J opined that, the presence of words 'shall be liable to imprisonment for six month' in s 3(a) of the Vagrants and Decrepit Persons Enactment (FMS Cap 191) did not make imprisonment term mandatory. Instead, it gave the court an absolute discretion as to whether it shall award a sentence of imprisonment provided thereto or dealt with the accused under and in accordance with s 294 of the CPC. G

From the above discussion, it can be concluded that if the legislature intended the words 'shall be liable' to found in s 55D of the Act 155 to overrule s 294 of the CPC, then it must, to borrow the words of Ong Hock Sim FJ in *Jayanathan's* case, '... be so expressed in the clearest possible language', which I failed to find any. Alternatively, it should provide the words 'shall be punished' instead of the word 'shall be liable' as in the case of *PP v Leonard Glenn Francis* [1989] 2 MLJ 158. H

In the aforesaid *Leonard's* case, the accused was charged, inter alia, under s 8 of the Firearms (Increased Penalties) Act 1971, which provides as follows: I

Any person who is in unlawful possession of a firearm *shall be punished* with imprisonment for a term which may extend to fourteen years and with whipping not less than six strokes. (Emphasis added.)

A The accused pleaded guilty and was subsequently convicted and was bound over in the sum of \$10,000 with two sureties for five years under s 294 of the CPC. On appeal, it was held that (at p 158):

B The learned president was clearly in error. Once a conviction is recorded in respect of an offence under s 8 of the Firearms (Increased Penalties) Act 1971, the provision of s 294 of [the CPC] are overridden and the court *must* proceed to impose a sentence of imprisonment and whipping with not less than six strokes. The sentence in respect of the first charge cannot be justified in law or on principle. ... (Emphasis added.)

C which clearly shows that, the presence of the words 'shall be punished' upon a record of conviction, requires the court to mandatorily impose the sentence provided by law.

D That being so, in view of the fact that the learned magistrate did not bind over the accused in the instant case under s 294 of the CPC which I would have done having regard to the facts of the case in relation to the public policy of sentencing, the question that needs further analysis is:

How should the words 'shall be liable' be put to interact with the conjunction 'and' present after each limb of the 'penalty part' of the aforesaid s 55D?

The answer to that, as demonstrated earlier above is that, by comparative case study clearly shows that:

- E (1) the aforesaid conjunction 'and' should be construed 'disjunctively'; and
(2) the three type of penalties provided thereto, ie (i) the fine, (ii) the imprisonment term and (iii) the whipping, can be imposed either in the 'alternative' or 'cumulatively',

F which I will next endeavour to illustrate.

G In *PP v Sharikat Perusahaan Makanan Haiwan Berkerjasama* [1969] 2 MLJ 250, the respondents were charged under regulation 5 of the Food Control (Rice Milling) Regulations 1950 punishable under s 22(i) of the Control of Supplies Act No 14 of 1961. Sharma J, at p 251 of the said case in respect of the legislative intention of the words 'and' and 'or', has this to say:

H ... It is occasionally necessary to read the conjunction 'and' as if it were 'or' so that the meaning and the intent of the legislature can be carried out. One should, however, be reluctant to convert 'and' into 'or' or vice versa in a penal statute if the result of it is going to be unfavourable to the subject, but there is no rule of law to that effect (*R v Oakes* [1959] 2 All ER 92).

What was said above is consonant with what was stated by Thornton in his book, *Legislature Drafting* (3rd Ed, 1987) at p 287, in the following words:

I Penal provisions are not drafted in a vacuum; they are part of the wider Criminal Law and that must never be overlooked. They are subject to restrictive construction and the benefit of doubt in case of possible alternative construction will be given to the accused.

From the above, it can be concluded that, what Sharma J said as 'one should, ..., be reluctant to convert "and" into "or" ... in a penal statute ...' is because of what Thornton meant by the 'penal provisions are ... subject to restrictive construction'. It is more so, if such 'conversion' resulted in an unfavourable effect to an accused person according to Sharma J. However, according to Thornton, if there is a possible alternative construction, the 'benefit of doubt' of the need to convert the conjunction 'and' to read as 'or' so that the meaning and intent of the legislature can be carried out must be given to the accused person so long as it would not be unfavourable to him. Applying that conclusion by way of parallel comparative analogy to the instant case before me, there is definitely such 'a possible alternative construction' which is certainly not going to be 'unfavourable' to the accused. As such, it is therefore necessary to construe the conjunction 'and' in the said s 55D of Act 155 as having a 'disjunctive effect', enabling the court to impose the three type of the penalties provided thereto either 'alternatively disjunctive', or 'cumulatively conjunctive'. That being so and after a careful evaluation all of the relevant facts of the case before me, I concluded that the former option is the most fair and justifiable option to apply. There are exhaustive decided cases that I can adopt to support my said conclusion, of which, some have been referred to earlier by me.

In *Nili's* case, Power J opined that the presence of the words:

... liable to imprisonment ... and a fine ... and whipping,

found in the amended s 56 of the Brunei Immigration Enactment, empower the court to impose the specified imprisonment sentence or the specified fine or the specified whipping in the 'alternative' disjunctively, or 'cumulatively conjunctive'. It is important to note here that both the aforesaid ss 56 and 55D of Act 155 have three common characteristics. They are:

- (1) both are provided with same types of penalty limbs, that is, (a) a fine; (b) an imprisonment; and (c) whipping;
- (2) the word 'and' appears after each of the said three limbs; and
- (3) there is no comma after each of the aforesaid three limbs.

Thus, the presence of such similarities convinced me to conclude that the principle applied in the said *Nili's* case should also be equally applicable to the instant case before me.

In the case of *PP v Wahab*, both the 'alternative' and 'cumulative' methods were in operation. In the lower court, the learned magistrate was clearly applying then alternative method by just imposing a sentence of four strokes of whipping. On revision, Hashim J (as he then was), in enhancing the sentence by imposing '\$50 fine in default three months imprisonment' and affirming the sentence of whipping, demonstrates clearly that he was exercising his power 'cumulatively'. He imposed the said fine in lieu of what he held to be a non-mandatory imprisonment term provided in s 6(1) of the relevant Ordinance. Under the said s 6(1), the word 'and' also appears after the specified imprisonment term but before the sentence

- A of whipping. It is to be noted here that a comma is present before the word 'and', and yet his Lordship held that, the specified imprisonment term so provided was still not mandatory because of the effect of the presence of the words 'liable to' in the said section.

- B Section 408 of the Penal Code, which provides that a person who is convicted of the offence under the said section,

... shall be punished with imprisonment for a term ... and with whipping, and shall also be liable to fine,

- C came to be considered in the case of *PP v Khairuddin* [1982] 1 MLJ 331. It is to be observed that there was no comma after the specified imprisonment term unlike the aforesaid *Wahab's* case. In that case, Azmi J (as he then was), in enhancing one day imprisonment imposed by the learned President to 18 months, did not impose any sentence of whipping. In doing so, his Lordship must have interpreted the word 'and' present thereto as 'disjunctive' and not conjunctive.

- D In *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167, the accused was charged under s 409 of the Penal Code which provides a penalty provision of a person convicted thereunder as follows:

... shall be punished with imprisonment ... and with whipping, and shall also be liable to fine.

- E He pleaded guilty to the charge preferred against him in the High Court, whereby he was convicted and sentenced to eight years imprisonment and \$100,000 fine. He appealed to the (then) Supreme Court. On appeal, the said sentence was reduced to four years of imprisonment and the aforesaid fine was set aside since full restitution had been made by the accused. Here again, both the High Court and the Supreme Court did not impose any whipping sentence in spite of the presence of the word 'and' and the absence of any comma after specified imprisonment term similar to that found in s 55D of the Act 155.

- G In the above premises, it is thus my firm conclusion that the word 'and' found in s 55D of the Act 155 must therefore be construed 'conjunctively'. Secondly, the sentences provided in the said section, can be imposed either in the 'alternative' or 'cumulatively'. Which of the two options to apply will have to depend on all the relevant facts of each case. In the instant case and on the facts, it has persuasively compelled me to adopt the first option. In doing so, and on the facts, it is my considered opinion that the most appropriate sentence would be a fine in the manner specified by the first limb of the 'penalty part' in s 55D of Act 155. In doing so, I have not divorced myself from observing and being guided by the famous case of *R v Ball* [1951] 35 Cr App R 164 at p 165.

- H From the facts of the case, it was not denied by the accused that he did sell each falsified document at RM250. He was doing that since the introduction of the 'temporary six months work permits' by the Immigration Department. However, neither the investigation nor the facts can assist me to determine as to how much the accused had benefitted from his wrongful

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activities. Without that aid, the most appropriate thing for me to fall back to is the very 'penalty part' of s 55D of Act 155. A

From it, the sequence of the three limbs of the 'penalty part' is first, a fine, followed by 'the imprisonment term' and lastly 'the whipping sentence'. By that order, I inferred that it must have been the intention of the legislature to punish the offender like the accused first, by an appropriate fine if the facts against his wrongful act so justified before considering the other alternative penalties. I cannot find any evidence to convince me that on the balance of probabilities, an imposition of an appropriate fine will not help the accused to realize his wrongful act of falsifying such documents or any other criminal act, and at the same time deter others from doing the same wrong. I say so because, the accused can neither pay the fine imposed by the court below nor by me; that inability to pay the fine in itself, beside being in remand and later in prison since his arrest, in my considered opinion, will certainly deter the accused from committing the same offence or any other criminal act of similar nature in the future. It is my humble view that, it is only when there is convincing evidence to show that the accused can 'buy' his wrongful act with a sentence of just a fine from the proceeds of his wrongful act direct or indirectly that the court should find and inflict other alternative penalties (see *Khairuddin's* case, per Azmi J (as he then was) at p 332) but not otherwise (see *Abdullah Ang's* case). I cannot find any of such evidence in the instant case before me; thus my decision on 21 April 1998. B C D E

Order accordingly.

Reported by Loo Lai Mee

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